Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-936

ATLAS TACK CORPORATION,
Petitioner,

v.

RAYMOND MAHONEY, ET. AL.,
Respondents.

ATLAS TACK CORPORATION,
Petitioner,

v.

RAYMOND HOEFEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

PAGE(S)

Opinions below 1

Jurisdiction 2

Questions presented 2

Constitutional provisions, statutes and federal rules involved 2

Statement of the case 3

Reasons for granting the writ 8

Conclusion 17

Citations

Cases:

Adams v. *Budd Company*, 349 F.2d 368 (3d Cir. 1965) 10

Bowers v. *Ulpiano Casal, Inc.* 393 F.2d 421 (1st. Cir. 1968) 10

Caporale v. *Di-Com Corporation*, 345 F. Supp. 153 (N.D. Ill. 1972) 12

Cole v. *Riss & Co.*, 16 F.R.D. 263 (W.D. Mo. 1954) 15

Giba v. *International Union of Electrical, Radio and Machine Workers*, 205 F. Supp. 553 (D. Conn. 1962) 10-11

Hoefel v. *Atlas Tack Corporation*, 581 F.2d 1 (1st Cir. 1978) 2

International Union, United Automobile, Aircraft and Agricultural Implement Workers v. *Atlas Tack Corporation*, No. 73-1165 (D. Mass. June 2, 1978), *oral argument on appeal* No. 78-1336 (1st Cir. December 4, 1978) 13-14

Local 180 of International Union United A.A. & A.I. Workers v. *J. I. Case Co.*, 185 F. Supp. 130 (E.D. Wis. 1960) 11-12

PAGE(S)

O'Rourke v. *Breakstone Bros. Inc.*, 218 F. Supp. 648 (S.D.N.Y. 1963) 12-13

Pajares v. *United Steelworkers of America, Local 5769*, 432 F. Supp. 418 (E.D. La. 1977) 10

Safeway Stores v. *Fannan*, 308 F.2d 94 (9th Cir. 1962) 16

Southwell v. *Robertson*, 27 F. Supp. 944 (E.D. Pa. 1939) 15

United States v. *United States Gypsum Co.*, 67 F. Supp. 397 (D.D.C. 1946), *rev'd on other grounds*, 333 U.S. 364, 68 S.Ct. 525 (1948) 14-15

* * *

Statutes and Rules:

Federal Rules of Civil Procedure Rule 41(b) 2, 6, 7, 14-16

Labor Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185(a) 2, 9-12

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 8

* * *

United States Constitution:

Amendment Five 2, 14

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Petitioner, Atlas Tack Corporation, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the First Circuit entered in the above case on August 9, 1978.

Opinions Below

The opinion of the District Court for the District of Massachusetts is printed in Appendix A hereto and is not re-

ported. The opinion of the Court of Appeals is printed in Appendix B hereto and is reported at 581 F.2d 1 (1978).

Jurisdiction

The opinion of the Court of Appeals affirming the judgment of the United States District Court for the District of Massachusetts was entered on August 9, 1978. The motion of petitioner for a rehearing was denied by order of the Court of Appeals entered on September 12, 1978. This order is printed in Appendix C hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Did the First Circuit err in affirming the judgment entered in favor of the respondents in *Mahoney* v. *Atlas Tack Corporation ("Mahoney")* where there is no federal subject matter jurisdiction under Section 301(a) of the Labor Management Relations Act?

2. Was there a denial of petitioner's right to due process under the Fifth Amendment to the United States Constitution, when, after the entry of judgment, the District Court reversed its prior grant of petitioner's motion to dismiss respondents' contract claims and ruled in favor of respondents on those claims?

Constitutional Provisions, Statutes and Rules Involved

The constitutional provision involved is the due process clause of the Fifth Amendment to the United States Constitution. The statute upon which subject matter jurisdiction was purportedly based is Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (a). The federal rule involved is Rule 41(b), F.R. Civ. P. Since these provisions are lengthy, they are set forth in Appendix F hereto.

Statement of the Case

In 1973 respondents in *Mahoney,* all retired non-union employees of petitioner, commenced an action against petitioner and others in the Bristol County Superior Court, State of Massachusetts, for damages and other relief arising out of petitioner's termination of a certain pension plan. Respondent in *Hoefel* v. *Atlas Tack Corp.* (*"Hoefel"*), a retired employee of petitioner who was a member of the Atlas Tack Metal Workers Union, A.F.L. Federal Labor Union No. 3947, subsequently commenced a separate action against petitioner in the same court for his benefits under the terminated pension plan. In both actions respondents claimed that the termination of the pension plan and the cessation of payments to respondents thereunder constituted breaches of contracts between petitioner and the individual respondents.

The pension plan was instituted by petitioner for its union employees in 1964 as a result of collective bargaining negotiations with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and Local 889 thereof (hereinafter collectively the "Union"). However, petitioner voluntarily covered both union and non-union employees under the plan. All contributions to the pension plan were made by petitioner.

At the time the pension plan was instituted, it was fully described to the employees of petitioner by representatives of Aetna Insurance Company ("Aetna"), from whom annuity contracts were to be purchased under the plan. The pension plan and the contract with Aetna were made available to employees of petitioner at meetings conducted at petitioner's facilities by representatives of Aetna. Later petitioner made a summary of the plan available to its employees.

The summary of the pension plan, which specifically referred to the plan and the related Aetna contract as containing the governing terms then in effect, provided in relevant part:

> "The Company fully expects to continue the Plan subject to the terms of its present Pension Agreement with its employees. However, since future changes in conditions cannot be forseen, *the Company necessarily reserves the right to change, suspend or discontinue the Plan at any time.*
>
> • • •
>
> "If it is discontinued, the Plan provides that the Annuity Purchase Fund will be allocated for the exclusive benefit of Employees who are then included or who have retained a vested interest in the Plan. If an employee is not receiving pension benefits at the time of discontinuance, his benefits credited under the Plan may be reduced or cancelled, depending on the status and method of application of the Annuity Purchase Fund." [Emphasis added]

Paragraph H1-3 of the plan further provided that:

> "Neither the consent of the Member nor that of any other payee is required for any amendment to the Plan as provided above."

Similarly, Paragraphs H2-1 and H2-2 of the pension plan clearly forewarned employees of the possible termination of the plan and of the possibility that upon termination the assets of the plan might be insufficient to pay retirement benefits:

> *"Termination of Plan*
>
> "The Plan may be terminated in whole or in part by the Employer at any time.
>
> "If the Plan is terminated, unapplied payments and other assets of the Plan will be disposed of through the purchase of annuities or otherwise for the exclusive benefit of Members and their beneficiaries, in the order of priority stated at the end of this paragraph. . . . . The amount of retirement benefit will be determined from the Member's annuity credits on the date of termination of the Plan; provided if the assets are insufficient to provide the full retirement benefits for all persons in a class, a pro rata allocation will be made for that class and no retirement benefits will be provided for succeeding classes. . . . ."

The plan then set forth an "order of priority" for the application of its assets upon termination.

As initially instituted, the pension plan was an insured plan which required the petitioner to purchase a lifetime annuity contract for each employee when he retired. In April 1968, with the consent of the Union, petitioner converted the plan to a trust-funded plan, pursuant to which all payments were to be paid out of a "retirement trust". The 1968 amendment provided in that regard:

> "Employer contributions accumulated under the Plan before a Member's retirement will be held by the Trustees and managed and disposed of in accordance with the terms of this Plan and of the Trust Agreement which is hereby made a part of the Plan. Expenses relating to the Trust may be paid from funds held by the Trustees. *Annuity payments referred to herein shall be paid by the Trustees from the funds held by them and need not be provided for by purchase of an annuity contract from an insurance company unless the Trustees in their sole discretion shall so elect in individual cases.*" [Emphasis added]

Each of the respondents retired after the conversion of the pension plan to a trusteed plan in April 1968. Accordingly, no annuity contracts had been purchased by petitioner upon the retirement of the respondents for the

payment of their pension benefits and, pursuant to the terms of the pension plan as amended, their benefits were to be paid directly out of the assets of the retirement trust fund.

The Union terminated its collective bargaining agreement with petitioner, effective June 30, 1972. Thereafter the Union membership rejected an agreement proposed by the Union and an impasse was reached in the negotiation of a new agreement. After the June 30, 1972 termination of the collective bargaining agreement and after the Union membership's rejection of a further agreement and the consequent impasse in the negotiation of a new contract, petitioner terminated the pension plan. The plan was terminated by petitioner in accordance with its express terms, and thereafter the assets of the plan were distributed pursuant to the schedule of distribution set forth therein. When the plan was terminated and its assets distributed to the retirees, the respondents' regular pension benefits ceased.

The respondents subsequently commenced their actions against petitioner. Although only common law claims had been asserted, the *Mahoney* and *Hoefel* actions were subsequently removed to the United States District Court for the District of Massachusetts, on the assumption that federal subject matter jurisdiction existed, and were consolidated for trial.

At the close of the respondents' case the District Court, upon defendants' motion under Rule 41(b), F.R. Civ. P., dismissed the respondents' complaints to the extent that they rested upon a contract theory. However, the District Court retained the actions insofar as the respondents might have been able to establish a claim on the theory of promissory estoppel under Massachusetts law.*

* Promissory estoppel, although not pleaded, was raised and argued by the respondents.

Near the close of the trial, respondents moved the District Court to reconsider its grant of the defendants' motion to dismiss under Rule 41(b). Their motion for reconsideration was denied.

At the close of the trial the District Court entered its oral findings. The Court found for the respondents against petitioner on a theory of promissory estoppel and dismissed the claims against the other defendants.

On September 1, 1977, the District Court entered judgment for the respondents, reserving the right to assign written reasons. App. D.

On September 28, 1977, petitioner appealed from the judgment of the District Court. Respondents took cross-appeals which were later withdrawn.

The District Court subsequently filed a written opinion (App. A), dated November 1, 1977, wherein it not only reaffirmed its decision on the respondents' promissory estoppel claims, but also reversed its Rule 41(b), F.R. Civ. P., dismissal of their contract claims and held that they were entitled to recover on those claims as well.

Petitioner appealed from the judgment of the District Court on the issues of liability and damages. In an opinion (App. B) dated August 9, 1978, the United States Court of Appeals for the First Circuit affirmed the judgment as to respondents' contractual rights to pension benefits. However, the First Circuit held that since it had ruled on respondents' contract claims (the dismissal of which had been reversed by the District Court), it had no occasion to rule on the alternative promissory estoppel claims, which were the only claims on which evidence was submitted at the trial. The First Circuit rejected, *inter alia*, petitioner's contention that the District Court's grant of its Rule 41(b) motion to dismiss the contract claims at the end

of respondents' case rendered the subsequent grant of relief on those claims reversible error.

In an order entered September 12, 1978, the First Circuit denied petitioner's motion for rehearing. App. C.

REASONS FOR GRANTING THE WRIT

I.

The Opinion Of The First Circuit Raises An Important Federal Question As To The Propriety Of Entertaining Subject Matter Jurisdiction Pursuant To Section 301 Of The Labor Management Relations Act Over The Common Law Claims Of The Respondents.

The judgment of the District Court awarded damages to former employees of petitioner who were not members of the Union which negotiated the collective bargaining agreement pursuant to which the pension plan was established. In fact, the plan upon which the respondents' suits were brought had been terminated by petitioner after the Union had terminated its collective bargaining agreement with petitioner and after the Union membership had rejected a tentative agreement.

The actions commenced by the respondents did not allege any violation of a federal statute or any breach of a collective bargaining agreement. The bill for declaratory and injunctive relief filed by the respondents in *Mahoney* in the Superior Court of Massachusetts specifically stated that their action was brought under the laws of Massachusetts.

Nor did the respondents assert diversity jurisdiction pursuant to 28 U.S.C. § 1332. Indeed, complete diversity did not exist between the petitioner and the respondents, and none could have been asserted.

The respondents simply sought and were awarded damages against the petitioner for breach of alleged contracts and on the theory of promissory estoppel. As to the questionable basis for federal jurisdiction over the respondents' claims, the District Court itself observed in a footnote:

> "When the matter reached trial, it became apparent that the plaintiffs were not union members and that as the court noted *sua sponte,* this jurisdictional basis was doubtful. However, the court retained jurisdiction on the basis of the allegations of the complaint." App. 1a.

In other words, after expressing doubts as to its jurisdiction under Section 301, the District Court granted judgment in favor of individual employees for retirement benefits under the pension plan, even though their complaints merely alleged common law causes of action for breach of contract, and specifically stated that their actions were brought under state law.

The District Court's retention of jurisdiction over common law claims in the face of its own doubts about the existence of federal jurisdiction and in the absence of any allegations in the complaints which would support federal jurisdiction presents an important federal question as to the undue extension of the jurisdiction of federal courts over disputes which arise solely under state law.

The District Court purported to retain jurisdiction of these disputes under Section 301(a) of the Labor Management Relations Act, (29 U.S.C.A. § 185(a)), which provides that:

> *"Suits for violation of contracts between an employer and a labor organization representing employees* in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the

> parties, without respect to the amount in controversy or without regard to the citizenship of the parties." [Emphasis added]

Violations of alleged individual contracts of employment are not within the purview of Section 301. *See Adams* v. *Budd Company*, 349 F.2d 368 (3d Cir. 1965); *Giba* v. *International Union of Electrical, Radio and Machine Workers*, 205 F. Supp. 553 (D. Conn. 1962).

Federal courts have no jurisdiction under Section 301 over an action based upon an alleged contractual agreement between an individual and his employer when there is no breach of a collective bargaining agreement. *See Bowers* v. *Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968); *Pajares* v. *United Steelworkers of America, Local 5769*, 432 F. Supp. 418, 422 (E.D. La. 1977).

In *Adams* v. *Budd Company, supra*, an action brought by employee-union members against a company and a union, in which federal jurisdiction was alleged, the Third Circuit affirmed the dismissal of the complaint because of the absence of federal jurisdiction:

> "The plaintiffs seem to be oblivious of the fact that *Section 301(a) only creates federal jurisdiction, in the absence of diversity of citizenship, with respect to '[s]uits for violation of contracts between an employer and a labor organization. . . . or between any such labor organizations. . . .'*" *Id.* at 369-70. [Emphasis added]

Similarly, in *Giba* v. *International Union of Electrical, Radio and Machine Workers, supra*, the district court granted a motion to remand the action to state court for lack of federal jurisdiction since under Section 301 there was no allegation of a breach of a collective bargaining agreement:

> "In the present case the claimed breach of contract rights of each of these plaintiffs *arose not out of the collective bargaining agreement, but out of the individual employment contracts* which each had with [the employer]. . . .
>
> • • •
>
> *"In all of the theories advanced by the plaintiffs,* whether breach of contract, breach of trust, third-party beneficiary or whatever, as the source of the plaintiffs' rights, *none is federally created; all are ancient common law."* *Id.* at 555-56. [Emphasis added]

Nor does a pension plan itself support Section 301 jurisdiction in the absence of a subsisting collective bargaining agreement. Individual contracts for a pension between the individual employees and petitioner do not fall within the jurisdiction conferred on federal courts by Section 301 since they do not involve the administration or interpretation of a collective bargaining agreement.

In the instant case, since the respondents were not members of the collective bargaining unit which had bargained for the pension plan and there was no contract "between an employer and a labor organization" in force at the time the pension plan was terminated in accordance with its terms, Section 301 does not confer federal jurisdiction over the claims alleged by the respondents.

Furthermore, federal courts have refused to entertain jurisdiction for an alleged breach of "a promise personal to the employees":

> *"Promises securing individual rights of employees, as* those concerning vacation pay, wages, or *pension rights*, may not be enforced by the labor organization either alone or on behalf of the employees under Section 301(a) of the [Labor Management Rela-

> tions] Act." *Local 180 of International Union, United A.A. & A.I. Workers* v. *J.I. Case Co.*, 185 F. Supp. 130, 132-33 (E.D. Wis. 1960). [Emphasis added]

A fortiori, actions by individual employees for alleged violations of such rights are not within the jurisdictional purview of Section 301.

The decision in *Caporale* v. *Di-Com Corporation*, 345 F. Supp. 153 (N.D. Ill. 1972), directly addressed the issue of the jurisdiction of federal courts under Section 301 with respect to the enforcement of pension and other benefits. In that case the plaintiffs conceded that there was no collective bargaining agreement, but argued that federal courts have jurisdiction over agreements to contribute to pension funds even in the absence of a collective bargaining agreement. The court rejected such an unwarranted interpretation of Section 301, holding that since "there is no collective bargaining agreement between defendant and any union which establishes an obligation for defendant to contribute to these funds, this court does not have jurisdiction of this case under 29 U.S.C. § 185." *Id.* at 155.

In its opinion in *Caporale*, the district court relied on the decision in *O'Rourke* v. *Breakstone Bros. Inc.*, 218 F. Supp. 648 (S.D.N.Y. 1963), in which Chief Judge Ryan held that a federal court has no jurisdiction under Section 301 over a suit to compel an accounting for, and payment of, contributions allegedly due to a welfare fund, even though the fund was established pursuant to a terminated collective bargaining agreement and the suit was to recover monies due during the term of the collective bargaining agreement:

> "It is not without significance that even in those cases where the Court decided in favor of extending federal jurisdiction to suits involving these funds, the underlying collective bargaining agreement was still in effect, there was a subsisting relationship of employer and employee, and the plaintiff union was acting as the representative of the employees in what might have conceivably developed into a labor dispute. Here, we have no such link with a labor dispute or labor contract; *if the existing collective bargaining agreement be the underlying 'labor contract' essential for invoking the jurisdiction of Section 301, as we think it must at the very least be, then its absence or termination cuts off any arguable coverage under Section 301; standing alone, a welfare and pension plan could hardly qualify as a 'labor contract' for purposes of Section 301.*" *Id.* at 651. [Emphasis added]

This reasoning is even more compelling when the action is brought not by the collective bargaining unit which bargained for the pension plan but by individual employees who were not even members of that collective bargaining unit.

Under the applicable federal decisions, federal jurisdiction was patently lacking in this case and the First Circuit erred in affirming the judgment of the court below.

The error in the retention of federal jurisdiction by the District Court and First Circuit is highlighted by the fact that a different District Judge sitting in the same District Court dismissed for lack of federal jurisdiction an action by the very same collective bargaining unit which negotiated the pension plan to require petitioner to continue the plan. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *Atlas Tack Corporation*, 73 Civ. 1165 (D. Mass. June 2, 1978), *oral argument on appeal* No. 781336 (1st Cir. December 4, 1978). After examining the entire record and conducting a hearing on the issue of federal jurisdiction, the District Court in that case held that at the time of the

termination of the pension plan there was no existing collective bargaining agreement which would confer jurisdiction under the Labor Management Relations Act. App. 32a. The District Court further held that the existence of the pension plan alone "cannot operate to confer jurisdiction on this Court." App. 32a.

II.

Certiorari Should Be Granted To Review The Important Federal Question Of Whether The District Court's Reversal Of Its Prior Grant Of Petitioner's Rule 41(b) Motion To Dismiss Deprived Petitioner Of Its Right To Due Process.

After the respondents had submitted their evidence in the District Court, petitioner moved pursuant to F.R. Civ. P. 41(b) to dismiss respondents' claims. The District Court granted the motion with respect to all claims for breach of contract.

After petitioner had presented its case to the District Court (limited in accordance with the prior dismissal of respondents' claims for breach of contract), respondents moved for reconsideration of the Court's dismissal of their contract claims. The District Court denied this motion, thereby reaffirming its holding (and petitioner's reliance thereon) that the claims for breach of contract had been dismissed. In fact, the District Court conceded in a footnote to its opinion that:

> "At the time of the trial, and at its conclusion, I thought that there was no contract, and, if there was a contract, no breach because of the termination clause." App. 7a.

Only after the entry of judgment did the District Court reverse the dismissal of the contract claims, thereby denying petitioner's right to due process under the Fifth Amendment to the United States Constitution with respect to the presentation of its defenses to those claims.

Petitioner had the right to rely upon the dismissal of the contract claims and not to submit evidence thereon, since motions under Rule 41(b):

> ". . . provide a defendant with a method of midtrial attack upon the plaintiff's case, and a *means of determining whether or not the defendant must present his evidence.*" *United States* v. *United States Gypsum Co.*, 67 F. Supp. 397, 419 (D.D.C. 1946), *rev'd on other grounds*, 333 U.S. 364, 68 S.Ct. 525 (1948). [Emphasis added]

Furthermore, F.R. Civ. P. 41(b) provides that an order of dismissal has the following effect:

> "(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF . . . After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal *on the ground that upon the facts and the law the plaintiff has shown no right to relief.* The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). *Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under*

Rule 19, operates as an adjudication upon the merits." [Emphasis added]

Unless qualified by a court, an order of dismissal under Rule 41(b) constitutes a dismissal with prejudice and an adjudication on the merits . *Safeway Stores* v. *Fannan,* 308 F.2d 94 (9th Cir. 1962).

The grant of its motion for dismissal under Rule 41(b) constituted a "judgment" for the petitioner (*Southwell* v. *Robertson,* 27 F. Supp. 944 (E.D. Pa. 1939); *Cole* v. *Riss & Co.,* 16 F.R.D. 263 (W.D. Mo. 1954)) and should not have been reversed. This was clearly an abuse of discretion and irreparably prejudiced petitioner's defense.

The prejudice to petitioner by this abuse of discretion is evidenced by the fact that the First Circuit affirmed the District Court's decision strictly on the breach of contract theory and did not rule on the alternative ground of promissory estoppel. The judgment was granted and affirmed on claims which petitioner, when submitting its case, justifiably believed had been dismissed with prejudice under Rule 41(b).

The District Court's reversal of the Rule 41(b) dismissal deprived petitioner of its right to due process and a fair hearing on its defenses. This reversal of its dismissal raises important federal questions under the due process clause of the Constitution and as to the construction of Rule 41(b) and the effect of a dismissal thereunder.

Conclusion

For the aforesaid reasons, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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